

Lucky Project Development Limited

(Appellant)

and

Collector of Stamp Revenue

(Respondent)

District Court
(Stamp Appeal No. 6 of 2017)

Deputy District Judge C. Chow

Date of Hearing: 8 March 2018

Date of Decision: 16 March 2018

Stamp Duty Ordinance (Cap.117) – ad valorem stamp duty – sale of property by tender
– whether a Form of Tender amounts to an agreement for sale – sections 29A(1)
and 29AE

A set of “Particulars of Sale by Public Tender” was issued by order of a vendor (“the Vendor”) to invite tender for the purchase of a non-residential property (“the Property”) before the deadline of 31 January 2013. Pursuant to such invitation, the Appellant submitted a duly completed Form of Tender (“Tender”) on 31 January 2013 offering to buy the Property and signified its acceptance of the “Conditions of Sale by Tender” (“the Conditions”). The Vendor signified its acceptance of the Tender on 28 February 2013. A memorandum of agreement (“the Agreement”) was entered into between the Vendor and the Appellant on 6 March 2013. The conveyance of the Property was completed upon execution of an assignment (“the Assignment”) by the parties on 29 April 2013.

On 22 February 2013, the Government announced proposed measures to further

address the overheated property market by amending the Stamp Duty Ordinance (“the Ordinance”) through the Stamp Duty (Amendment) Bill 2013. Stamp Duty (Amendment) (No 2) Ordinance 2014 (“the Amendment Ordinance”) was subsequently enacted and came into effect retrospectively from 23 February 2013 (“the Effective Date”).

The Assignment was charged with ad valorem stamp duty (“AVD”) at the enhanced (Scale 1) rates introduced by the Amendment Ordinance. The Appellant appealed to the Court and contended that the Amendment Ordinance was inapplicable to the present case. Its grounds of appeal were: (a) the relevant agreement of sale for stamp duty purpose should be the Conditions and the Tender collectively; (b) a contract for the purchase and sale of the Property was concluded before the Effective Date; and/or (c) the acquisition of the Property consisted of a series of events beginning on 31 January 2013 when the irrevocable Tender was submitted.

Held:

- (1) Although paragraph (a) of the definition of “agreement for sale” in section 29A(1) of the Ordinance uses the word “or”, it still refers to a person contracting to sell or purchase. Without the acceptance of an offer, no contract can be formed. Section 29A(1) has not dispensed with the basic requirement of consensus *ad idem*.
- (2) The contract governing the rights and obligations of the parties during the tender process is not the contract for sale of the Property. The Appellant was only obliged not to revoke the Tender until the date stipulated in the Conditions, while the Vendor and the Appellant both had the obligation, upon acceptance of the Tender, to sign the Agreement. Those obligations did not constitute an agreement for sale within the meaning of the Ordinance.
- (3) There was no contract for the sale or purchase of the Property at the time of the submission of the Tender. Whether the Tender was revocable or not, it remains an offer from the Appellant only. The agreement for sale of the Property was not formed when the appellant submitted the Tender. It was only formed upon acceptance of the Tender by the Vendor.
- (4) The Tender remains an irrevocable offer notwithstanding the presence of a causal relationship that the signing of the Agreement was a step taken pursuant to the Tender. No agreement for sale of the Property could be constituted without

acceptance of a tender. For the same reasons, section 29AE(2)(a)(ii) of the Ordinance is not applicable as the Tender could not be an agreement for sale when no beneficial interest in the Property was conferred. It was not one of a series of agreements for sale. The Tender and the acceptance were signed by the Appellant and the Vendor separately and on different dates, but altogether they form one single instrument.

Appeal dismissed.

In the District Court

Mr Kenneth CL Chan and Mr Dixon Co (instructed by Kitty So & Tong) for the appellant

Mr Suen Sze Yick (government counsel of Department of Justice) for the respondent

Cases referred to in the decision

The Queen (Ontario) v Ron Engineering & Construction (Eastern) Ltd [1981] 1 SCR 111

Wincheer Investments Ltd v Lobley Co Ltd (unreported, CACV 82/1996, 3 October 1996)